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May 10, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0172**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant appealed to the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as an engineer and auditor at the DOE's Rocky Flats site (the site) for many years. The Applicant filed an application with the OWA, requesting physician panel review of non-Hodgkin's lymphoma (NHL).

The Panel issued a negative determination. The Panel stated that the cause of NHL is being debated and that there are many proposed risk factors. The Panel noted some studies showing an increased risk among workers exposed to solvents, but found that the Applicant did not have significant solvent exposure. The Panel stated that the Applicant would not have spent the majority of his day on the production floor and, when there, would not have handled solvents frequently. The Panel concluded that "considering all of the available data . . . there is no evidence for a significant work contribution" to the Applicant's NHL. The Panel then speculated that the Applicant's brother might have had NHL involving the bone marrow.

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g).

The OWA accepted the determination, and the Applicant appealed. The Applicant disagrees with the Panel's statement that he would not have spent the majority of his day on the production floor and, when there, would not have handled solvents frequently. The Applicant also states that the Panel's reference to his brother is incorrect. Finally, the Applicant believes that the combination of radiation and solvent exposure should be sufficient to establish that "it is at least as likely as not" that exposures were a significant factor in his NHL.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's disagreement with the Panel's statement concerning the extent of his exposure to solvents does not indicate Panel error. The record does not indicate that the Applicant spent more than half of his time on the production floor or that his work on the floor involved significant exposure. If the Applicant wishes to seek further consideration based on the description of his work set forth in his appeal, the Applicant should contact DOL on how to proceed.

The Applicant's argument that the Panel incorrectly stated that his brother had cancer does not indicate material Panel error. As indicated above, the Panel's speculation about the Applicant's brother was not a factor in its determination.

Finally, the Applicant's argument that radiation and solvent exposure, taken together, support a positive determination does not indicate panel error. That argument

is a disagreement with the Panel's medical judgment, not a basis for finding Panel error.

As the foregoing indicates, the Applicant has not identified Panel error. Accordingly, the appeal should be denied.

In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0172 be, and hereby is, denied.

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 10, 2005